No. 87-514

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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JAMES L. HOOPER AND
DEER PARK MEDICAL GROUP, P.A.,

Petitioners,

v.

STEPHEN H. SACHS, DALE P. KELBERMAN,
AND ANDREW C. TARTAGLINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether to defeat a motion for summary judgment plaintiffs were required to produce direct evidence of the content of defendants' communications among themselves in circumstances in which the evidence adduced was subject to conflicting inferences, in which defendants' testimonies were inconsistent, conflicting, and self-contradictory, in which the only direct evidence of the content of the communications was solely within defendants' knowledge, and in which potentially incriminating documents under defendants' exclusive control were claimed to have been lost.*/

*/ The parties are referred to as in the district court. For additional parties in the district court who no longer are involved in this case, see, our Application for Enlargement of Time to File Petition for a Writ of Certiorari (footnote at 2), filed September 21, 1987.

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TO THE UNITED STATES COURT OF APPEALS
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TO: THE HONORABLE, THE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

James L. Hooper and Deer Park Medical Group, P.A., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 86-1623.

OPINIONS BELOW

The unreported opinion of the court of appeals appears at page 1 of the Appendix, filed as a separate volume with this petition. Opinions of the district court appear at pages 8, 23, 32, 38, and 111 of the Appendix. The opinion of the district court which appears at page 38 of the Appendix is reported at 618 F. Supp. 963. All other district court opinions are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1987. No petition for rehearing was filed, and no orders were entered relating to a petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and 2101(c). An extension of time to file this petition was sought on September 21, 1987, and was denied on September 24, 1987.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

The Fourth Amendment to the Constitution of the United States Provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to

be a statute of the District of Columbia.

Rule 56 (b) and (c) of the Federal Rules of Civil Procedure provides:

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT

1. Nature of the Case

This case is before the Court on a petition for a writ of certiorari filed by James L. Hooper, M.D., and Deer Park Medical Group, P.A. ("Deer Park"), to review the judgment of the United States Court of Appeals for the Fourth Circuit (A. 126),1/ affirming a summary judgment for defendants by the United States District Court for the District of Maryland2/ in this 42 U.S.C. 1983 damages action against Stephen H. Sachs (former Attorney General of Maryland), Dale P. Kelberman (an Assistant Attorney General of Maryland), and Andrew C. Tartaglino (former Chief Investigator for the Maryland

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1/ "A." references are to the separately bound Appendix to this Petition. "J.A." references are to pages of the Joint Appendix in the court of appeals, which we requested be certified to this Court pursuant to Rule 19.2. Since we understand the Court no longer wishes that done, we are lodging a copy with the Clerk.

2/ The court of appeals judgment incorrectly identifies the district court.

Medicaid Fraud Control Unit ("MFCU"), a part of the Office of the Office of the Attorney General). The action asserts defendants violated plaintiffs' Fourth Amendment rights by utilizing Dr. Cheryl Winchell, a private individual, to search and seize plaintiffs' records for the MFCU for use in a contemplated criminal investigation and subsequent abortive prosecution of Dr. Hooper.

2. The Facts and Evidence

On February 21, 1980, defendant Tartaglino was telephoned by Dr. Cheryl Winchell, a disgruntled former employee, and a shareholder of Deer Park who was involved in civil litigation with Dr. Hooper and Deer Park. Winchell claimed to have incriminating information about Dr. Hooper. Tartaglino made an appointment with Winchell. A. 47.

Winchell first met with Tartaglino in Baltimore on February 27, 1980. She brought with her some documents she had obtained from

Deer Park during prior discovery in her pending civil litigation (A. 47-49).3/ At that meeting, which was attended by Winchell, defendants Tartaglino and Kelberman, and, for at least part of the time, Anton Keating, then Chief Counsel to the MFCU (J.A. 502, 725, 732, 857-858), Winchell stated that she was engaged in litigation with Dr. Hooper and Deer Park and that she had a date the following month to go back to Deer Park to conduct further discovery. According to a contemporaneous memorandum written by Kelberman (J.A. 506-507) and his testimony in a 1982 deposition (J.A. 870), Winchell brought with her to that initial meeting 10 or 11 Medicaid vouchers and Deer Park patient charts relating to those patients. The claim

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3/ The civil litigation brought by Winchell included allegations that Deer Park had engaged in Medicaid Fraud. As part of that litigation Winchell had conducted discovery at Deer Park in late 1979. At the time of the contact she was seeking further discovery. Winchell was successful in her request prior to the time she met with the MFCU. A. 3-4.

was that Deer Park and Dr. Hooper had billed Medicaid for patient office visits that did not take place. Winchell claimed the charts and vouchers did not match and that therefore money was fraudulently obtained (A.4). It is undisputed defendants did nothing improper in accepting these initial documents from Winchell. They were obtained by Winchell prior to any contact with the MFCU.

Winchell returned to Deer Park twice after her meeting with the MFCU -- on March 10 and 12, 1980 -- to inspect and copy documents (A. 4-5). Some of the patient charts she copied, and in particular the original charts of patients Jackson, Fogle, and Clark, which at that time were seen by Dr. Hooper on the seat of Winchell's car, were never again located at Deer Park (J.A. 716-717). They were introduced in evidence by Kelberman at the subsequent criminal trial of Dr. Hooper (J.A. 717). See, infra. When

Winchell was at Deer Park on her final visit, she made the comment (J.A. 718, 720):

> My work is finished. The State will soon take over.

In late March, 1980, about two weeks after Winchell's last visit to Deer Park, the MFCU commenced an investigation of Dr. Hooper and Deer Park (A.5). Thousands of documents were subpoenaed, including the charts of patients Jackson, Fogle, and Clark (J.A. 717). As stated above, these charts could not be located because they previously had been removed by Winchell during one of her "discovery" visits which occurred after she contacted and met with the State.

In the Spring of 1982, Dr. Hooper was tried in Montgomery County Maryland Circuit Court on a 330 Count criminal information. At the close of the State's six-day presentation of its case a judgment of acquittal was directed by the court because the State failed to prove a prima facie case (A. 5).

The missing charts of Jackson, Fogle, and Clark were introduced as evidence at the criminal trial (J.A. 717). Furthermore, a number of charts were introduced in evidence by the MFCU on which the patient name had been whited-out. These charts obviously were obtained from Winchell who had been instructed by the MFCU in the initial meeting to white-out the patient names on charts she procured from Deer Park and furnished to the MFCU. J.A. 716-718, 740-741.

In September, 1982, Hooper and Deer Park filed the instant action alleging civil rights violations (J.A. 3, 18-24). Following dismissal of the initial complaint (A. 9-17), leave was granted to file an amended complaint alleging a Fourth Amendment violation -- that Winchell was acting as an agent of the MFCU when she copied and removed documents from Deer Park in March, 1980 --

after she contracted and met with the MFCU (A. 38-39).

The district court denied subsequent motions to dismiss (A. 38-110). It held, inter alia, that to prove a Fourth Amendment violation plaintiffs must prove (1) that Winchell delivered documents to the MFCU after her initial meeting with the MFCU in February, 1980; (2) that the documents so delivered were different from those she initially provided; (3) that the MFCU directed Winchell to obtain additional records; and (4) that Winchell would not have done so but for the MFCU's direction (A. 57-58).

The testimony of the defendants was inconsistent and self-contradictory respecting contacts with Winchell and the total number of Deer Park charts Winchell

delivered and when she produced them.4/ In a contemporaneous memorandum, and in a 1982 deposition, Kelberman stated Winchell turned over 10 or 11 vouchers and charts at the February 27, 1980, meeting (J.A. 506-507, 870). Tartaglino stated in an affidavit in support of the summary judgment motion that Winchell turned documents over to the MFCU only once (J.A. 499). However, in deposition (J.A. 872-874, 963) he testified she produced more documents later. Defendants

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4/ Winchell's testimony concerning going to the MFCU and her purpose for so doing also was self-contradictory. In 1983 she testified she sought advice from her attorney, John Stoppleman, before contacting the MFCU (J.A. 847). After her attorneys were called to testify and stated that Winchell did not seek their advice or turn over "discovered" documents to them (J.A. 921-923, 940, 946-947), Winchell, in 1986, changed her story, stating that she did not seek legal advice and may not have turned the discovery over to her counsel (J.A. 847, 851-856, 859-862, 923, 942). She also admitted that when she contacted the MFCU she was becoming very concerned with the ongoing expense of her suits against Hooper and Deer Park and that the problem of expense was causing her domestic problems (J.A. 861-862). See also, J.A. 919, 924-925.

admitted that Winchell gave them a total of about 27 charts and that from 5 to 15 percent of the documents used by the MFCU at Hooper's criminal trial came from Winchell (J.A. 743, 907). Thus, it is clear Winchell did turn over Deer Park documents (charts and vouchers) to the MFCU after her initial February meeting with Tartaglino, et al., and that those documents were different from the ones she originally provided. Apart from personal delivery, the record is clear Winchell mailed documents to Tartaglino about March 23, 1980. See, J.A. 732-738. In that communication, Winchell makes reference to the missing Jackson, Fogle, and Clark charts. See, J.A. 734-736.

Further, Anton Keating, former Chief Counsel to the MFCU at the time he testified, stated that they "didn't know what they [the MFCU] were doing" (J.A. 884) and that

Tartaglino had "a DEA mentality"5/ as well as a different view of constitutional rights. Most importantly, he stated that in some instances the MFCU did ask private individuals to obtain additional documents for them, that the MFCU was willing to take any help it could get, that they "might have" (see also, J.A. 869) asked Winchell to get more documents from Deer Park, and that if Tartaglino had any legal questions about what to do, he might have talked only with Kelberman.6/ J.A. 877-884.

Defendants and Winchell, who at the time was a defendant, all denied that

5/ "DEA" refers to the Drug Enforcement Administration, where Tartaglino formerly had been employed.

6/ Kelberman, during the prosecution, accepted what he believed to be information harmful to Dr. Hooper from one of Hooper's former defense counsel (J.A. 756-758). He also permitted another MFCU investigator (Rose) to testify at Hooper's trial that all of the Deer Park documents introduced in evidence at Hooper's trial came via the MFCU's subpoena. Though Kelberman knew some of the documents came from Winchell, he did not inform Rose, and he made no effort to correct Rose's testimony. J.A. 740-745.

Winchell was instructed to obtain additional documents at or subsequent to the February 27, 1980, meeting. However, documents which may have related to communications with, or documents from, Winchell between February 28 and March 24, 1980 -- plainly, a critical period -- were missing from the MFCU's files when they finally were produced in discovery after motions to compel. See, J.A. 447-465, 979-999, 1001, 1004-1013. The files were in the custody of the State at all times (J.A. 997-999).

3. Decisions Below

Following plaintiffs' discovery, defendants moved for summary judgment. Despite contradictions in the testimony, credibility issues, missing documents under control of the defendants relating to a time period critical to the issues involved, and the differing inferences the district court itself stated reasonably could be drawn from the evidence adduced, including especially

the meaning of Winchell's statement that her work was finished and that the State would soon take over (see, A. 114-117), the district court granted summary judgment for defendants (A. 122-125), stating that the case was just on the side of the line requiring judgment for defendants (A. 114).

The court of appeals summarily affirmed. In an unpublished per curiam opinion (A. 1-7), it stated that there was no direct evidence that the MFCU encouraged[7] Winchell in her activity and that the absence of direct evidence together with the defendants' sworn denials of facts solely

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7/ The court of appeals seemingly modified the district court's holding that specific direction of Winchell need be proven to establish a Fourth Amendment violation. See, e.g., United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985), certiorari denied, 474 U.S. 1034; United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981); United States v. Merkjian, 505 F.2d 1320, 1328 (5th Cir. 1975). As this Court stated in Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971), it is not possible to reduce "Fourth Amendment law to complete order and harmony."

within defendants' knowledge validated the district court's summary judgment. The court of appeals did not discuss defendants' conflicting and inconsistent testimony, their demonstrably false testimony on other relevant matters, the fact that documents in defendants' control relating to a period critical to this case were "missing", and did not consider the evidence in light of all the existing circumstances. Rather, as stated above, it considered defendants' denials and the lack of direct evidence to the contrary in isolation from the rest of the record, and on that basis found judgment for defendants appropriate (A. 6-7).

ARGUMENT

A. Summary Judgment Requires Further Clarification

We respectfully submit that no Rule of the Federal Rules of Civil Procedure has produced more confusion and less consistent application than Rule 56 -- especially Rule 56(b) and (c) concerning summary judgments

for defendants. As the Tenth Circuit recently observed, "[T]he debate about summary judgment continues...". Windon Third Oil & Gas v. FDIC, 805 F.2d 342, 345 (1986).

Properly applied, summary judgments are an economy for both litigants and the judicial system. The Rule is intended to result in a judgment only when there is no genuine dispute as to any material fact. It is not intended to substitute for a trial, and summary judgment should not be awarded when an issue turns on credibility. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., ____U.S.____, 106 S. Ct. 2505, 2513 (1986). In Anderson, this Court cautioned that its opinion should not be read as a license for over zealous grants of

summary judgments stating (106 S. Ct. at 2514-2515):

> We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

The Court further warned that "[i]f reasonable minds could differ as to the import of the evidence, ... a verdict [or summary judgment] should not be directed." Id. at 2511.

The general admonitions of this Court and the courts of appeals against a rush to judgment notwithstanding, application of the standard has not been either simple or uniform. On the one hand, a court of appeals has said that a bare assertion to support a fanciful allegation where the facts are within the exclusive control of the defendant, and could be obtained only by discovery, is insufficient to defeat a motion for summary judgment. See, Knight v. U.S.

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Fire Ins. Co., 804 F.2d 9, 12 (2nd Cir. 1986), certiorari denied, ___U.S.___, 107 S. Ct. 1570. By contrast, other courts of appeals have stated that there are some facts it usually is difficult, if not impossible, to show by direct evidence, and accordingly circumstantial evidence will suffice to defeat a defendant's motion for summary judgment. See, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3rd Cir. 1987) (en banc), petition for certiorari pending; Wakefield v. Northern Telecom, Inc., 813 F.2d 535, 540 (2nd Cir. 1987). Indeed, the same courts which will affirm findings of administrative agencies based on the "substantial evidence" standard will deny a party the Constitutional right to trial by jury in a civil case on evidence they would find "substantial" in their review

of administrative adjudications.8/ See, e.g., NLRB v. Overnite Transportation Company, 308 F.2d 279, 282 (4th Cir. 1962) ("'The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence'"); Virginia Steel Corporation v. NLRB, 300 F.2d 168, 174 (4th Cir. 1962) (to like effect).

Perhaps most unsettling is permitting criminal cases to go to a jury, and affirming convictions, based on evidence on which the same court would grant summary judgment for a civil defendant. While the standard of proof

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8/ We recognize that the "substantial evidence" standard is more akin to a motion for judgment n.o.v. than to motion for summary judgment or for a directed verdict because it is a review of all the evidence after a decision on the factual issues has been rendered, rather than a legal determination that only one reasonable conclusion is permissible before the trier of fact has resolved the issues. Nonetheless, there are more similarities than differences in the standards applicable to the respective judicial determinations. Only consistency in the application is lacking.

required for a conviction of criminality is said to be higher and stricter than that required in a civil case, the fact is that criminal cases proceed to a jury verdict in circumstances in which the plaintiff might well suffer a summary judgment against him in a civil case where the burden of proof is the less stringent "more probable than not." See, e.g., United States v. Martino, 759 F.2d 998, 1005 (2nd Cir. 1985) (jury may consider false exculpatory statement as evidence of guilt); United States v. Barnes, 604 F.2d 121, 147 (2nd Cir. 1979), certiorari denied, 446 U.S. 907 (showing large amounts of unexplained cash probative of allegation of drug trafficking); United States v. Sanchez, 722 F.2d 1501, 1505-1506 (11th Cir. 1984), certiorari denied, sub nom. Gonzales v. United States, 467 U.S. 1208 (jury free to choose among reasonable construction of evidence and make reasonable inferences and choices, and not necessary such evidence

exclude every reasonable hypothesis of innocence.)

We demonstrate below that the court of appeals, without discussion, has affirmed a district court's grant of summary judgment, which, on its face, recognizes that different reasonable inferences are possible from the evidence of record, and that the court of appeals erroneously has set a requirement for direct evidence of facts exclusively within defendants' knowledge and control.

It is, we submit, appropriate for this Court to exercise its power of supervision both on the merits of this case -- the improper grant and affirmance of summary judgment -- and as a vehicle for clarification and further creation of uniform standards in the lower courts.

B. Summary Judgment Was Inappropriate in This Case

The sum and substance of the evidence of record, as set forth in the Statement, supra, is as follows. Winchell contacted

Tartaglino. She met with him, Kelberman, and, at least for part of the time with Keating, on February 27, 1980. At that time, according to a memorandum by Kelberman, dated February 28, 1980, Winchell provided copies of 10 or 11 patient charts and related vouchers from Deer Park. She also informed MFCU employees Tartaglino and Kelberman that she was engaged in civil litigation with Deer Park and Hooper and that she had an opportunity to return to Deer Park to get additional documents. While defendants denied there was any instruction given for Winchell to return to Deer Park and get more documents for the MFCU, the former Chief Counsel for the Unit testified that he was unsure whether or not more documents were asked for and that it was not unlikely that such a request would have been made. See also, J.A. 869 where in 1982 the substance of Kelberman's answer to this question is that he does not remember.

On March 10 and 12, 1980, Winchell returned to Deer Park to do further discovery pursuant to the order she obtained from the Montgomery County Circuit Court. That order was granted from the bench on February 22, 1980, five days prior to Winchell's February 27, 1980 meeting with the MFCU.

When Winchell returned to Deer Park in March, 1980, she removed at least three original patient charts and copied others. Those three original charts (Jackson, Fogle, and Clark), which had been seen at Deer Park shortly prior to Winchell's March 10 visit, and plainly had been there subsequent to Winchell's November, 1979, visits, were seen on March 10 on the seat of Winchell's car by Dr. Hooper. They were not seen thereafter at Deer Park and could not be located by Deer Park in response to the MRCU's subpoena, issued the end of March, 1980. However, the Jackson, Fogle, and Clark charts were used as evidence by the MFCU at Dr. Hooper's criminal

trial, as were other documents provided to the MFCU by Winchell from her March, 1980, discovery. In fact, the MFCU's own documents establish that the Jackson, Fogle, and Clark charts were provided to the MFCU by Winchell and that those charts could not be found at Deer Park. See, J.A. 760-770. In interviewing a former Deer Park employee, Tartaglino specifically made reference to "George Ann [sic] Clark's chart" (J.A. 760).

By order of the Montgomery County Circuit Court, Winchell was directed to keep confidential names of patients on charts she copied. Charts used in evidence at the Hooper criminal trial included charts with last names blotted out, and, as stated above, included the charts of Jackson, Fogle, and Clark. According to Kelberman, Winchell provided a total of 27 charts -- obviously more than the 10 or 11 she provided at the February 27 meeting. Thus, it is clear

Winchell provided materials from Deer Park after February 27.

Other documents provided by defendants establish that Winchell supplied additional documents after the February 27 meeting. In an envelope postmarked March 23, 1980, and addressed to Tartaglino, Winchell sent a handwritten list indicating other charts and related Deer Park documents she had obtained. The following day, Tartaglino made a trip, concerning Deer Park, to Montgomery Village, which is where Winchell's office was located (J.A. 730, 780-781). Below a double line on that list are the names of Medicaid patients whose charts Winchell stated were "in her attorney's office."9/ Included among the names below that double line are the names Ray Jackson, William Fogle, and Georgann Clark -- the

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9/ As stated, supra, Winchell did not give these documents to any of her counsel.

patient charts Hooper saw in Winchell's car on March 10, 1980, and which were not thereafter found at Deer Park.

There is no direct evidence that Tartaglino, et al., encouraged Winchell in her activities; however, there is circumstantial evidence, which is reenforced by the fact that Kelberman, Tartaglino, and Winchell have been far less than candid with respect to those things on which there is direct evidence which contradicts their evasive and inconsistent testimonies. The resolution of the latter two issues turned, of necessity, on the credibility of the defendants considered in the light of all circumstances, including their demonstrably untrue testimony as to other matters.10/

10/ In this regard, we again note that defendants produced their investigatory file in the Hooper matter only after our motion to compel was granted. See, J.A. 448-454. Certain documents were missing from those files when they were produced. The documents in the file were sequentially numbered. From this we could tell that documents inserted or [continued next page]

Defendants clearly were not entitled to summary judgment.

The court of appeals simply failed to consider the entire record in this case. It culled out and isolated one part of the evidence. But, that is not all there was. As set forth, supra, defendants plainly were inconsistent and untruthful with respect to other elements of which the district court required proof.

Just as surely as a jury is entitled to consider a false exculpatory statement as evidence of guilt in a criminal case, it is entitled to consider defendants' denials in

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10/ [continued] written during periods critical to this case -- February 28-March 3, 1980, March 19-March 27, 1980, April 15-May 2, 1980, May 7-May 13, 1980, May 14-June 6, 1980, June 12-June 13, 1980, June 25-June 30, 1980, July 24-July 31, 1980 -- were missing and had not been produced. Ultimately virtually all documents were produced (see, J.A. 1004-1005), excepting, of course, documents that would have been produced or filed during a period of time critical to plaintiffs' claims -- February 28-March 24, 1980. The inference to be drawn is not favorable to defendants.

the context of their other false statements and missing documents under defendants' control and relating to a critical time concerning Winchell and the defendants in determining whether defendants were being truthful as to matters peculiarly within their knowledge. A jury also is entitled to use its common sense in evaluating the evidence against defendants. It also is entitled to consider Winchell's statement at Deer Park that "the State will soon take over."

In evaluating these things, the district court made ultimate conclusions. It was no more entitled to enter summary judgment on that basis than it would have been if it believed that plaintiffs ultimately would not prevail before a jury. See, McBride v. Merrill Dow and Pharmaceuticals, Inc., 800 F.2d 1208, 1212 (D.C. Cir. 1986).

While we do not believe the evidence compels a verdict for plaintiffs, we do think a verdict for plaintiffs is a permissible reasonable conclusion. If that is so, based on the entire record, the decision of the court of appeals must be reversed.

Circumstantial evidence and matters of credibility cannot be considered in isolation. If direct evidence were required to prove agreements, motive, and intent, such a case rarely, if ever, could be won. To so require, especially in a civil context, is to license wrongdoing, and to convert the summary judgment procedure into an illegitimate shield for the wrongdoer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 30, 1987, I caused three (3) copies of the foregoing Petition and three (3) copies of the Appendix to the Petition to be mailed, first-class, postage prepaid, to Andrew H. Baida, Esquire, Office of the Attorney General, Munsey Building - 2nd Floor, 7 North Calvert Street, Baltimore, Maryland 21202.*/

STEPHEN A. ARMSTRONG

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*/ The Petition and Appendix were served and filed on the above date. Substituted copies of the Petition with typographical errors corrected have been served, and a separate Certificate of Service has been filed.

HOO.BR